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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 314

JOSEPH ROTONDO,

Petitioner,

*against*

ISTHMIAN STEAMSHIP CO., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT ISTHMIAN STEAMSHIP CO., INC., IN OPPOSITION

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### Opinions Below

No opinion was rendered in the District Court.

The opinion of the Court of Appeals for the Second Circuit is reported at 243 F. (2d) 295.

### Questions Presented

Petitioner asserts as grounds for review that the courts below should have permitted him to examine the jurors as to their discussions in the jury room in resolv-

ing questions of fact and that a gratuitous statement of the District Judge in answer to an inquiry by a juror constituted reversible error even though not solicited by respondent and despite failure of counsel for petitioner to object that the statement was improper, move for a mistrial or request further instructions to the jury.

## Statement

Petitioner seeks to review the judgment of the Court of Appeals for the Second Circuit, affirming the judgment entered upon the verdict of the jury in favor of respondent.

Petitioner, a longshoreman employed by a stevedore, was injured when he fell into a hatch while working aboard respondent's vessel. It was alleged that he slipped on some grease negligently permitted to remain there by respondent, but that issue was resolved in favor of respondent and is not on review here.

## POINT I

**Affidavit of jurors are not admissible to impeach their verdict.**

Petitioner seeks to obtain information which would permit him to show that the jurors were mistaken as to the law applicable and thus have the jurors impeach their own general verdict.

It is submitted that the affidavit of a juror under such circumstances can not be used to impeach his verdict.

The rule applicable is stated in *McDonald* v. *Pless*, 238 U. S. 264, at page 267:

> * * * the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon

controlling considerations of public policy which, in these cases uses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or other members of the jury, is made the basis of a motion for a new trial the Court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room.

"These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at the verdict, and the defendant ought to have had relief, if the facts could be proved by witnesses who were competent to testify in a proceeding to set aside a verdict. But let it once be established that verdict solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in the publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be used, the result would be to make what was intended to be a private deliberation the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference."

In *Stein* v. *New York*, 346 U. S. 156, 178, this Court said:

"Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset or harass

them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases. *McDonald* v. *Pless*, 238 U. S. 264. * * *"

In *United States* v. *Furlong* (7 Cir.) 194 Fed. (2d), 1, 4, cert. den. 343 U. S. 950, the Court said:

> "It is axiomatic that an affidavit of a juror as to what occurred in the jury room during deliberation of the jury will not be considered, for sound public policy prohibits impeachment of a verdict by a member of the jury who participates in it. The return to the court is in fact the verdict of twelve; and an attempt by one, afterwards, to impeach it can receive no consideration. This well established doctrine is based upon sound reasoning."

The Court also pointed out (p. 5) that the fact that other jurors came to the Judge after the affidavit found its way into the newspapers was of no consequence but illustrated the danger of permitting a juror to impeach the verdict because of anything inherent in it.

In *Parsons* v. *United States* (5 Cir.), 188 Fed. (2d) 878, at 879, the Court said:

> "Another is the claimed misconduct of the jury as attempted to be shown by the impeaching affidavit of one of the jurors as to matters said and done in the Jury room.
>
> "It is too well settled for argument or discussion that in the federal system jurors will not be heard to impeach their verdict by affidavits or testimony as to the manner of arriving at it."

In *Bateman* v. *Donovan* (9 Cir.), 131 Fed. (2d) 759, 765, the Court said:

> "In the instant case appellant alleges 'misconduct' on the part of the jury. From the content of the

juror's affidavit, the consideration accorded it by the District Court, and appellant's argument as detailed in his brief, it is apparent that the particular 'misconduct' endeavored to be established in that there was *mistake of the evidence and misapprehension of the law by the jury.* In view of the facts as here presented a very apt statement of the law is he following: "* * * the general rule is, that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law, on the part of the jury. * * * The verdict, in which they all concur, must be the best evidence of their belief, both as to the fact and the law, and therefore must be taken to be conclusive. * * *" *Murdock* v. *Sumner*, 39 Mass. 156, 22 Pickering. 156, 157.

* * *

"The case of *Mattox* v. *United States*, 1892, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917, relied upon by appellant, held that a juror may testify as to the existence of any extraneous influence, although not as to how far it operated upon his mind. We have here the existence of no extraneous influence; this there is a decided distinction."

In *Dept. of Water & Power of the City of Los Angeles* v. *Anderson*, (9 Cir.) 95 Fed. (2d) 577, cert. den. 305 U. S. 607, the Court said, page 586:

"Finally, appellant contends that a new trial should be granted because the jury misconceived the basis of appellant's liability. To show such alleged conception, appellant relies upon an affidavit of one of the jurors. However, the general rule that the testimony of jurors cannot be used to impeach their verdict is applicable here (citing)."

In *Poindexter* v. *Greves* (2 Cir.), 197 Fed. (2d) 915 a juror had stated that proper consideration was not given

to some of the evidence and that some of the instructions had been disregarded. This Court said, at page 919:

> "* * * Nothing was shown but how the jury considered the issues submitted to it for determination, and that doe snot warrant a departure from the firmly established rule that jurors may not be permitted to impeach their verdict. *McDonald* v. *Pless, supra, Jorgensen* v. *York Ice Mach. Corp.*, (2 Cir.) 160 Fed. (2d) 432, certiorari denied 332 U. S. 764, 68 S. Ct. 69, 92 L. Ed. 349; *United States* v. *Kansas City, Mo.*, 8 Cir., 157 F. 2d 459."

Under the rule of the cases above cited, the District Court properly refused to entertain the plaintiff's application to direct the Clerk of the Court to give the plaintiff the names and addresses of the jurors.

This attempt by petitioner is a graphic illustration of the advisability of the rule laid down by the Supreme Court in *McDonald* v. *Pless*, 238 U. S. 264. To grant the petitioner's application would, as pointed out on page 68 of the *Pless* decision, lead to the grossest fraud and abuse and no verdict would be safe. The cases cited by the petitioner do not support his argument.

There were extraneous influences in *Mattox* v. *United States*, 146 U. S. 140, (the bailiff made comments to the jury and read a newspaper account of the case in the jury room); *United States* v. *Reid*, 12 How. 361 (a juror had read a newspaper account of the trial yet no new trial was ordered); *Paramount Film Dist. Corp.* v. *Applebaum*, 217 Fed. (2d) 101 (conversations of jurors with persons not jurors regarding offers of settlement by defendant; also, kinship between a juror and a witness for plaintiff); *Southern Pac. Co.* v. *Klinge*, 65 Fed. (2d) 85 (one juror told the others defendant had made an offer to settle which, during an overnight recess, he investigated and verified

and communicated it to the other jurors; *Texas & New Orleans R.R. Co.* v. *Underhill*, 234 Fed. (2d) 620 (another employee of the railroad told at least 4 jurors he had an accident, was contemplating suing the railroad and that rules the railroad made were not enforced, to its knowledge); and *Stiles* v. *Lawrie*, 211 Fed. (2d) 188 (a juror used a manual, an incompetent document, which was not in evidence).

There is no evidence in the case at bar that the jurors submitted to extraneous or outside influences. The Trial Court thus properly refused to direct the Clerk to disclose the names and addresses of the jurors so that the petitioner might contact them concerning their consideration of the facts and the law applicable in their discussions prior to reaching their verdict in favor of the respondent.

## POINT II

**There was no reversible error in advising the jury in response to an inquiry that there was a workmen's compensation law in New York State.**

The colloquy between the jury and the Court without any participation by respondent was had one hour and twenty minutes after the jury retired. The jurors returned for instructions regarding a directed verdict and then asked whether they could award plaintiff any amount even though they found in favor of the defendant (244) and were advised they couldn't (245).

The Trial Court instructed the jury that this was not a matter for its consideration, although mentioning that New York had a Workmen's Compensation Law (245).

The Trial Court having instructed the jury that this was not a matter for their consideration, it is to be assumed that the jury considered such instruction in rendering its verdict (*Bedwell* v. *Grand Trunk Western Railroad Company* (7 Cir.) 226 Fed. (2d) 150, 154).

In *Fairmount Gas Works* v. *Culp Fork Coal Co.*, 287 U. S. 574, 585, cited in *Stevenson* v. *Hearst Consolidated Publications* (2nd Cir.) 214 Fed. (2d) 902, 911, cert. den. 348 U. S. 874, the Court said:

> "Appellate Courts should be slow to impute to juries a disregard of their duty and to Trial Courts a want of diligence or perspicacity in appraising the jury's conduct."

Furthermore, when the Trial Court instructed the jury that this was not a matter for its consideration and stated that New York has a Workmen's Compensation Law, petitioner's attorney's only comment was that he felt that the statute of limitations would bar the plaintiff with respect to compensation (245). There was no objection that such a statement to the jury was improper or that the New York statute did not apply (although the Longshoremen's Act, 33 U.S.C.A. 901, *et seq.*, which does apply is, for these purposes, identical with the New York Act) and no motion for a mistrial, nor any request that the Court re-instruct the jury that this was not a matter for its consideration.

The plaintiff having failed to advise the Trial Court of the basis of his objection should not now be heard to complain.

> *Rule 51 Federal Rules of Civil Procedure*;
> *Illinois Central R. R. Co.* v. *Friedman* (8 Cir.) 208 Fed. (2d) 675, 680, reh. den. 210 Fed. (2d) 229.

In *Edwards* v. *Steinns* (4 Cir.) 207 Fed. (2d) 734, the jury made a similar inquiry and the Court advised that compensation was not a matter for its consideration. There was evidence in the case that the plaintiff had not paid the medical expense but it had been paid by others, so

there was a clear indication of Workmen's Compensation. Notwithstanding this the Court held that there was no prejudice to the plaintiff.

In *Smith* v. *Boggia* (2d Cir.) 200 F. (2d) 604, the Court likened such comments to inadvertent statements about casualty insurance.

> A witness inadvertently stated that plaintiff, a policeman, had been paid but not by the village. A doctor stated that it was a compensation case when asked the reasonable value of his services.
>
> "* * * Both incidents were unexpected and unfortunate. But the New York cases hold that where information about insurance is inadvertently volunteered by a witness and not deliberately brought out by counsel, there is no reversible error."

In each of the cases cited by the petitioner, the defendant deliberately injected the question of the plaintiff's right to take Workmen's Compensation into the case. There was no mere inadvertent mention of the right to take compensation nor was the mention of compensation made by the Trial Court, without any participation therein by the defendant, in response to an inquiry by the jurors.

It is submitted that upon the instructions of the Trial Court and the failure of petitioner to take he proper exceptions, there was no prejudice to the petitioner under the circumstances of this case and that any claim of prejudice should not be reviewed (*Rule 61, Federal Rules of Civil Procedure*):

## POINT III

**The petition and brief of petitioner present no issues for review by this Court.**

There is no federal question involved, no conflict between the decisions of the courts below in the instant.

case and the decisions of this Court or of the New York courts, nor has there been any departure by the courts below from the acceptable and usual course of judicial proceedings calling for intervention by this Court.

The decisions of the courts below are correct.

## CONCLUSION

**The petition for writ of certiorari should be denied.**

Respectfully submitted,

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